Augustine a/l TK James (liquidator for Began Construction Sdn Bhd) v Liew Chong Min & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(A)-1296–07 OF 2022 AND W-02(A)-1297–07 OF 2022
AZIZAH NAWAWI, SEE MEE CHUN AND LIM CHONG FONG JJCA
12 JANUARY 2024

Companies and Corporations — Winding up — Disposition of property — liquidator applied to declare void company's disbursement of monies after presentation of winding up petition and sought order that directors reimburse the monies — Companies Act 2016, ss 472 and 541 — Whether evidence showed directors were aware of presentation of winding up petition when they caused disbursements to be made — Whether disbursements were not bona fide and did not benefit general body of creditors

The appellant in Appeal 1296 was the liquidator of Began Construction Sdn Bhd ('the company') which was ordered to be wound up by the court on 8 December 2017. The appellant filed a notice of motion in the High Court pursuant to ss 472 and 541 of the Companies Act 2016 ('the CA') to declare void the company's payment of a total sum of RM1,496,790.38 ('the impugned dispositions') to various parties after the date of presentation of the winding up petition on 5 October 2017. The appellant argued that the payments were an undue preference over other creditors of the company. When the winding up petition was presented, the first and second respondents ('R1' and 'R2') were the directors and shareholders of the company. The third respondent ('R3') was a lawyer who had acted for the company in an adjudication proceeding which concluded in the company's favour with an award to it of RM1,778,985.96. the company instructed R3's firm to receive the award and thereafter make out the impugned dispositions both to itself (in settlement of its fees and disbursements for work done) as well as to various other parties. In his notice of motion, the appellant sought an order that the respondents pay back the impugned depositions to the company and/or to the liquidator. The High Court dismissed the motion while allowing an application by R1 for a validation order under s 472 of the CA to validate the impugned dispositions. The instant appeals (1296 and 1297) were, respectively, against the dismissal of the appellant's motion and the allowing of R1's application. At the appeal hearing, the appellant submitted that since the winding up petition was served at the registered and business addresses of the company, R1 and R2 could not deny knowledge of the presentation of the petition when the impugned dispositions were made between 31 October 2017 and 24 November 2017. The appellant submitted that the dispositions were not made bona fide and did not benefit the general body of creditors. R1

denied that he had knowledge of the presentation of the winding up petition at all material times. In any event, he said, there was no evidence to show that any creditor had been prejudiced by the impugned dispositions. R3 asserted that neither he nor his firm had any knowledge of the winding up proceedings. R2 did not participate either in the High Court proceedings or in the instant appeal.

Held, unanimously dismissing the appeal against R3 and holding him not liable but otherwise allowing both the appeals, setting aside the decisions of the High Court, declaring the impugned dispositions void and ordering R1 and R2 to jointly and severally pay back the total amount of the impugned dispositions to the company and/or to the appellant:

(1) As the winding up petition was duly served at the company's registered office in accordance with the Companies (Winding-Up) Rules 1972, R1, being a director of the company, would have known of the presentation of the petition. This court found that he did have such knowledge and it went to show the absence of a good and honest intention on R1's part. The dispositions made after the presentation of the petition were void (see paras 38–39, 43, 45 & 57).

(2) The impugned dispositions were not bona fide and did not benefit the general body of creditors. Many of the payments were for repayment of loans to companies connected to R1 (there was no documentary proof that the loans were indeed given) or were payments to his siblings. The High Court was wrong to find that there was no evidence of undue preference as the list of creditors who had filed proofs of debt to the value of RM12,029,520.98 in the winding up showed that there were creditors who were prejudiced by the impugned dispositions (see paras 47–48 & 52–54).

(3) Since R2 did not reply to the assertions made by the appellant and did not participate in the proceedings before the High Court as well as in this appeal, he would be deemed to have admitted to the appellant's assertions. The effect was that R1 and R2 were equally liable (see para 58).

(4) There was no evidence to show that R3 and his firm had any knowledge of the winding up petition. The sum that was paid to R3's firm by the company was for work done for handling the adjudication proceedings and for complying with the company's instructions to pay out the award monies to the other parties. Liability for paying out the impugned dispositions could not possibly attach to R3 as he and his firm had merely acted on the company's instructions and had no knowledge about the winding up petition. Although R3 was not personally liable to restore the

A impugned dispositions made to himself/his firm and the other third parties, the dispositions were nevertheless void for breach of s 471(1) of the CA (see paras 59–65 & 69).

[Bahasa Malaysia summary

B Perayu dalam Rayuan 1296 adalah pelikuidasi Began Construction Sdn Bhd ('syarikat tersebut') yang telah diperintahkan untuk digulung oleh mahkamah pada 8 Disember 2017. Perayu memfailkan notis usul di Mahkamah Tinggi menurut ss 472 dan 541 Akta Syarikat 2016 ('AS') untuk mengisytiharkan tidak sah pembayaran syarikat sejumlah RM1,496,790.38 ('pelupusan yang C dipertikaikan') kepada pelbagai pihak selepas tarikh pengemukaan petisyen penggulungan pada 5 Oktober 2017. Perayu berhujah bahawa pembayaran adalah keutamaan tidak wajar terhadap pemiutang lain syarikat. Apabila petisyen penggulungan dikemukakan, responden pertama dan kedua ('R1' dan 'R2') adalah pengarah dan pemegang saham syarikat. Responden ketiga ('R3') D adalah seorang peguam yang telah bertindak untuk syarikat dalam prosiding adjudikasi yang memihak kepada syarikat dengan award RM1,778,985.96 kepadanya. Syarikat itu mengarahkan firma R3 untuk menerima award itu dan selepas itu membuat pelupusan yang dipertikai kepadanya (sebagai penyelesaian fi dan pengeluaran untuk kerja yang dilakukan) serta kepada E pelbagai pihak lain. Dalam notis usulnya, perayu meminta perintah supaya responden membayar balik pelupusan yang dipertikai kepada syarikat dan/atau kepada pelikuidasi. Mahkamah Tinggi menolak usul itu dengan membenarkan permohonan oleh R1 untuk perintah pengesahan di bawah s 472 AS untuk mengesahkan pelupusan yang dipertikaikan. Rayuan semasa F (1296 dan 1297) adalah, masing-masing, terhadap penolakan usul perayu dan membenarkan permohonan R1. Pada perbicaraan rayuan, perayu berhujah bahawa memandangkan petisyen penggulungan disampaikan di alamat berdaftar dan perniagaan syarikat, R1 dan R2 tidak dapat menafikan pengetahuan mengenai pengemukaan petisyen itu apabila pelupusan yang G dipertikaikan dibuat antara 31 Oktober 2017 dan 24 November 2017. Perayu berhujah bahawa pelupusan itu tidak dibuat secara bona fide dan tidak memberi manfaat kepada kesemua pemiutang. R1 menafikan bahawa dia mempunyai pengetahuan tentang pengemukaan petisyen penggulungan pada setiap masa yang material. Dalam apa jua keadaan, katanya, tiada keterangan H menunjukkan bahawa mana-mana pemiutang telah diprejudiskan dengan pelupusan yang dipertikaikan. R3 menegaskan bahawa beliau mahupun firmanya tidak mempunyai sebarang pengetahuan mengenai prosiding penggulungan. R2 tidak mengambil bahagian sama ada dalam prosiding Mahkamah Tinggi atau dalam rayuan semasa.

I

Diputuskan, menolak rayuan terhadap R3 dan memutuskannya tidak bertanggungjawab tetapi sebaliknya membenarkan kedua-dua rayuan itu, mengenepikan keputusan Mahkamah Tinggi, mengisytiharkan pelupusan yang dipertikaikan tidak sah dan memerintahkan R1 dan R2 membayar balik

secara bersama dan berasingan jumlah keseluruhan pelupusan yang dipertikaikan kepada syarikat dan/atau kepada perayu:

(1) Memandangkan petisyen penggulungan telah disampaikan dengan sewajarnya di pejabat berdaftar syarikat mengikut Kaedah-Kaedah Syarikat (Penggulungan) 1972, R1, sebagai pengarah syarikat, akan mengetahui pengemukaan petisyen itu. Mahkamah ini mendapati bahawa dia mempunyai pengetahuan sedemikian dan ia menunjukkan ketiadaan niat yang baik dan jujur di pihak R1. Pelupusan yang dibuat selepas pengemukaan petisyen adalah tidak sah (lihat perenggan 38–39, 43, 45 & 57).

(2) Pelupusan yang dipertikaikan itu tidak bona fide dan tidak menguntungkan keseluruhan pemiutang. Kebanyakan bayaran adalah untuk pembayaran balik pinjaman kepada syarikat yang berkaitan dengan R1 (tiada bukti dokumentar bahawa pinjaman itu memang diberikan) atau bayaran kepada adik-beradiknya. Mahkamah Tinggi salah apabila mendapati tiada keterangan keutamaan yang tidak wajar kerana senarai pemiutang yang telah memfailkan bukti keberhutangan kepada nilai RM12,029,520.98 dalam penggulungan menunjukkan terdapat pemiutang yang prejudis dengan pelupusan yang dipertikaikan (lihat perenggan 47–48 & 52–54).

(3) Memandangkan R2 tidak menjawab penegasan yang dibuat oleh perayu dan tidak mengambil bahagian dalam prosiding di hadapan Mahkamah Tinggi serta dalam rayuan ini, dia akan dianggap telah mengaku kepada penegasan perayu. Kesannya ialah R1 dan R2 bertanggungjawab secara bersama (lihat perenggan 58).

(4) Tiada keterangan untuk menunjukkan bahawa R3 dan firmanya mempunyai pengetahuan tentang petisyen penggulungan. Jumlah yang telah dibayar kepada firma R3 oleh syarikat adalah untuk kerja yang dilakukan untuk mengendalikan prosiding adjudikasi dan untuk mematuhi arahan syarikat untuk membayar wang award kepada pihak lain. Liabiliti untuk membayar pelupusan yang dipertikaikan tidak mungkin dilandaskan pada R3 kerana dia dan firmanya hanya bertindak atas arahan syarikat dan tidak mempunyai pengetahuan tentang petisyen penggulungan. Walaupun R3 tidak bertanggungjawab secara peribadi untuk memulangkan kembali pelupusan yang disangkal yang dibuat kepada dirinya/firmanya dan pihak ketiga yang lain, pelupusan itu bagaimanapun tidak sah kerana melanggar s 471(1) AS (lihat perenggan 59–65 & 69).]

Cases referred to

Azabar Holdings Sdn Bhd (in liquidation) v Kumarappan @ Thannirmalai a/l KM Palaniappan & Anor [2021] 3 MLJ 448, CA (refd)

BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another

action [1996] 1 MLJ 872, HC (refd)
Lembaga Kumpulan Wang Simpanan Pekerja v Adorna RMIT Sdn Bhd & Ors [2003] 4 MLJ 729, HC (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)
Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors [2008] 8 MLJ 450, HC (refd)
Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd [2013] 3 MLJ 313; [2013] 3 CLJ 969, FC (refd)
Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) [2011] 4 MLJ 161, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 223
Companies Act 2016 ss 2, 213(1), 471, 471(1), 472, 472(1), 541
Companies (Winding-Up) Rules 1972 r 25(1)
Legal Profession Act 1976 s 123

Appeal from: *Lim Wee Ngeh Painting Sdn Bhd v Liew Chong Min & Ors and other cases* [2022] MLJU 2070 (High Court, Kuala Lumpur)

Segaran Mathavan (with Mohd Aiziezuddin bin Suib) (S Mathavan & Nur Hafizah) in Civil Appeal Nos W-02(A)-1296–07 of 2022 and W-02(A)-1297–07 of 2022 for the appellant.
Gow Jia Jian (with Najwatul Aqilah Amli) (Gow Victor & Co) in Civil Appeal No W-02(A)-1296–07 of 2022 for the first respondent.
Yeoh Cho Kheong (with Jeffrey Lee Hur and Lock Jun Qi) (Ranjit Singh & Yeoh) in Civil Appeal No W-02(A)-1296–07 of 2022 for the third respondent
Gow Jia Jian (with Najwatul Aqilah Amli) (Gow Victor & Co) in Civil Appeal No W-02(A)-1297–07 of 2022 for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals, namely Appeal 1296 and Appeal 1297 being heard together. Parties have agreed that Appeal 1296 be heard first and that its decision binds Appeal 1297.

[2] All references to encls are to Appeal 1296 except where otherwise stated.

PARTIES

[3] The appellant who is the plaintiff in the High Court ('HC') is the liquidator of a wound up company, Began Construction Sdn Bhd ('the company'). The appellant was appointed pursuant to a court order dated 11 November 2019 to replace the official receiver ('OR').

[4] The first and second respondents/defendants were the directors and shareholders of the company when the winding up petition was presented. The second respondent was absent in the HC proceedings. The third respondent/defendant is an advocate and solicitor who was practising under the name and style of The Law Chambers of Tan Kinv Tat ('TKT').

BACKGROUND FACTS

[5] The appellant had filed a notice of motion (encl 1) in the HC pursuant to ss 472 and 541 of the Companies Act 2016 ('the CA 2016') that the list of dispositions as set out in para 1(a) to (o), paid to the creditors and to the third respondent, are void. The payments are as follows:

(a) a sum of RM100,036 of the company's money to The Law Chambers of Tan Kinv Tat, Advocates & Solicitors, the third respondent on the 13 November 2017;

(b) a sum of RM5,000 of the company's money to the The Law Chambers of Tan Kinv Tat, Advocates & Solicitors, the third respondent on the 24 November 2017;

(c) a sum of RM440,000 of the company's money to SJEE Engineering Sdn Bhd on 31 October 2017;

(d) a sum of RM20,000 of the company's money to Optad Marketing Sdn Bhd on the 31 October 2017;

(e) a sum of RM120,000 of the company's money to QST Solutions Sdn Bhd on the 31 October 2017;

(f) a sum of RM90,000 of the company's money to Perkasa Solaris Sdn Bhd on the 13 November 2017;

(g) a sum of RM68,419.30 of the company's money to Soon Hin Hardware Sdn Bhd on the 13 November 2017;

(h) a sum of RM66,203.98 of the company's money to Mega Tyre & Car Services on the 13 November 2017;

(i) a sum of RM50,000 of the company's money to Ng Sin Yee on the 24 November 2017;

A (j) a sum of RM67,331.10 of the company's money to Messrs Ferida, Hassan, Low & Ng on the 24 November 2017;

(k) a sum of RM100,000 of the company's money to Ng Chee Meng on the 24 November 2017;

B (l) a sum of RM40,000 of the company's money to Yik Seong Trading Sdn Bhd on the 24 November 2017;

(m) a sum of RM170,000 of the company's money to Public Bank Bhd on the 24 November 2017;

C (n) a sum of RM49,800 of the company's money to Ng Chee Siong on the 24 November 2017; and

(o) a sum of RM250,000 of the company's money to Perkasa Solaris Sdn Bhd on the 13 November 2017.

D

[6] In para 2, an order was sought that the respondents be jointly and severally liable to pay the company and/or the liquidator the above sums of RM1,531,754.38 as listed in para 1(c) to (o). Paragraph 3 next sought an order that the third respondent returns and/or pays the company and/or the E liquidator the sum of RM105,036 as listed in para 1(a) and (b).

[7] The principal grounds advanced were that all the above dispositions as listed in para 1(a) to (o) of encl 1 are void as they were made after the presentation of the winding up petition and/or also amounts to undue F preference over the company's creditors.

[8] Pursuant to an adjudication decision dated 21 August 2017, the company was awarded a sum of RM1,778,985.96 ('award sum'). The third respondent's firm who had acted for the company, was instructed by the first G and second respondents to receive the award sum. From this award sum, the sum of RM1,636,790.38 was paid out by the third respondent on the instructions of the first and second respondents.

H **[9]** The winding up petition against the company was presented on 5 October 2017 and the company was wound up on 8 December 2017.

[10] The fact that the dispositions were made after the presentation of the winding up petition and before the winding up order are not disputed. As a I matter of fact, the dispositions were made from 31 October 2017 to 24 November 2017.

[11] At the time of the filing of encl 1 on 2 August 2021 by the appellant, no validation order had been obtained in respect of the dispositions made.

[12] The appellant's motion was dismissed by the HC on 13 June 2022 leading to this appeal.

[13] For completeness, it has to be mentioned that the other Appeal 1297 relates to a notice of motion dated 3 December 2021 by the first respondent as the plaintiff to validate the dispositions made, pursuant to s 472 of the CA 2016. That motion was allowed by the HC, also on 13 June 2022.

DECISION IN THE HC

[14] The grounds of judgment ('GOJ') of the HC judge ('HCJ') are to be found in encl 56/14–50. The GOJ dealt with both the liquidator's motion to void the dispositions and the first respondent as the plaintiff's motion for validation. That GOJ also dealt with dispositions made to another legal firm, referred to by its acronym of W&T.

[15] In para 27 of the GOJ, the HCJ stated that it is trite that any disposition of the company's property made after the commencement of winding up shall be void and the company cannot dispose of its property in whatever form and by whatever means. This was after the relevant ss 472(1) and 541 of the CA 2016 and the authority of *Azabar Holdings Sdn Bhd (in liquidation) v Kumarappan @ Thannirmalai a/l KM Palaniappan & Anor* [2021] 3 MLJ 448 had been considered.

[16] As against the second respondent, it was stated that as he had not replied to the assertions made by the appellant, he would be deemed to have admitted to such assertions. However, the application of the *Ng Hee Thoong* principle would be subject to the court's decision on the first respondent's liability. Refer to paras 28 and 29 of GOJ.

[17] As against the first respondent, the HCJ found he had no knowledge of the winding up petition. It was held that the first respondent only knew of the winding up order after he received the notice to attend the first meeting of the creditors and contributories on 19 December 2017. The first respondent also had no involvement in the winding up petition as the winding up order was entered in the absence of the company.

[18] The HCJ then stated as follows:

> 38. As this court had made a finding that Liew as well as W&T had no knowledge of the petition, and as the monies were due and owing at the material times to the said creditors of the company; it is only to be expected that the dispositions were in the course of the company's ordinary trade and done in good faith ie, bona fide.
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> 39. From this I hold that the said dispositions were made to have benefitted the company's general body of creditors. Authority for this can be found in the case of

BSN Commercial Bank (M) Berhad v River View Properties Sdn Bhd and anor action [1996] 1 MLJ 872; [1996] 1 LNS 63; [1996] 4 MLRH 485 which has held that:

> [17] Dispositions are said to be void under s 223 of the Companies Act 1965 'unless the court otherwise orders'.
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> [18] Thus, each case must be approached and dealt with on its own facts and circumstances. No two cases are the same. It revolves on the good faith and honesty of the personalities, and it is here that the judge's common sense opinion of what is just and fair prevails: *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 at p 25; *Re J Leslie Engineers Co Ltd (In liquidation)* [1976] 1 WLR 292 at p 304 laid down the now classic principle that in deciding the existence of good faith and honest intention, the absence of knowledge by the transferee of the winding up petition was a very powerful factor in favour of validation. Incidentally, it is pertinent to note that in *Re Gray's Inn Construction Co Ltd*, it was held that the court should not validate a transaction if its effect was to pay off a creditor in full at the expense of the general creditors. Mr Wong Kim Fatt, at the Bar, informed this court that River View had no creditors, and consequently, he submitted that this court should validate the release of the fixed deposits to the current account of River View. It is my judgment that the court will always have regard as to whether the disposition was made bona fide in the course of the company's current trade, and if not validated, the trade of the company would be paralysed without any advantage as envisaged in *Re Clifton Place Garage Ltd* [1970] Ch 477 (CA).
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> 40. ... I also find that there is no evidence before this court which proves that the said payments made were not based on the good and honest intention of either Liew and/or W & T and as such I do hold that such payments are bona fide.

[19] The HCJ had also referred to the Federal Court case of *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313; [2013] 3 CLJ 969 on the principles of validation.

[20] The decision of the HCJ meant that the dispositions, including that to the third respondent, were not rendered void.

SUBMISSIONS OF THE APPELLANT

[21] The appellant had submitted that the first respondent had knowledge of the presentation of the winding up petition based on its fresh evidence showing the letter of service of the winding up petition, and the sealed judgment, both to the registered and business address. A director is the alter ego of a company and s 213(1) of the CA 2016 spells out the duties and responsibilities of directors.

[22] The third respondent too had knowledge and reference was made to the case of *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161.

[23] The dispositions were not beneficial to the general body of creditors or bona fide where they were to the first respondent's siblings and own companies and had nothing to do with the company's current trade.

[24] Contrary to the HCJ's finding that the appellant had not identified any creditors that would have been prejudiced, the appellant submitted it had provided a list of creditors who had submitted their proof of debt ('POD') with the OR.

SUBMISSIONS OF THE FIRST RESPONDENT

[25] The first respondent submitted that the HCJ had in para 34.1 of the GOJ held that the creditors were indeed authentic creditors of the company. The first respondent had no knowledge of the winding up petition. The letters of service cannot be regarded as the first respondent having actual or personal knowledge and such service is only a formal requirement to move the winding up proceedings along. As the first respondent had no knowledge of the winding up petition, the dispositions are deemed to have benefitted the company's general body of creditors. With regard to the dispositions being made to persons connected to the first respondent, this does not demonstrate fraudulent trading. Further it is settled law that a company is separate from its directors and shareholders. There was also no evidence of any creditor being prejudiced.

SUBMISSIONS OF THE THIRD RESPONDENT

[26] For the third respondent, it was submitted that neither the third respondent nor TKT was involved in the winding up petition or the subsequent proceedings; the instruction letters were issued and the dispositions made before the company was wound up; and there could be no cause of action under s 541 of the CA 2016.

OUR DECISION

[27] In this appeal, the appellant is not proceeding against the disposition of RM20,000 made to Optad Marketing Sdn Bhd ('Optad') and RM120,000 made to QST Solutions Sdn Bhd ('QST'). These are in respect of para 1(d) and (e) of encl 1.

[28] This leaves a balance sum of RM1,496,730.38 of which RM1,391,754.38 was made to various third parties and RM105,036 was made to the third respondent.

A THE LAW

[29] As the appellant's motion was premised on ss 471 and 541 of the CA 2016, we set out the relevant provisions as follows:

B 472 Avoidance of dispositions of property or certain attachment, etc.

(1) Any disposition of the property of the company, other than an exempt disposition, including any transfer of shares or alteration in the status of the members of the company made after the presentation of the winding up petition shall, unless the Court otherwise orders, be void.

C ...

541 Power of Court to assess damages against delinquent officers, etc.

(1) If in the course of winding up it appears that —

(a) any person who has taken part in the formation or promotion of the D company; or

(b) any past or present liquidator or officer, has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may, on the application of the liquidator or of any E creditor or contributory examine into the conduct of that person, liquidator or officer and compel him to repay or restore the money or property or any part of the money with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just. F

[30] It is indeed a trite principle of law that the disposition of the company's property after the presentation of the winding up petition on 5 October 2017 shall, unless the court otherwise orders, be void. This is evident from a reading G of s 471(1) of the CA 2016 itself.

[31] We will only need to refer to two high authorities to drive home this principle. The first is the Supreme Court case of *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] H 2 MLJ 449 where this was stated at p 456:

> Before considering these rival submissions, I like to state that the corresponding section in the English Companies Act 1948 is s 227. In *re Wiltshire Iron Company Ex parte Pearson* (1868) 3 Ch App 443, Lord Cairns LJ, speaking of the general purpose of s 153 (the forerunner of s 227) of the English Companies Act 1862, said I at p 446:
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> > The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for winding up shall, unless the court otherwise orders, be void. This is a wholesome and necessary

provision to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis ...

[32] This court in *Azabar Holdings*, which was also referred to by the HC stated as follows at p 462:

[37] As for the effect and consequences of a contravention of s 223 of the CA 1695, we think that it is highly relevant to refer to *In re AI Levy (Holdings) Ltd* [1964] Ch 19 where Buckley J (an obvious authority in company law jurisprudence) examined the equivalent section under English company law and said:

It appears to me that the object of the section is to protect the interests of the creditors from the possibly unfortunate results which would ensue from the presentation of a petition, and to protect their interests as much during the period while the petition was pending as after an order has been made on it. What the section provides in its present terms is that any disposition of the property of the company made after the commencement of the winding up shall be void in the winding up of the company unless the court otherwise orders; that is to say, *if and when the company comes to be put into liquidation the transaction is to be as if it had never taken place*. (Emphasis added.)

[33] However, this does not end the matter as it has also been said that the general rule in what used to be s 223 of the Companies Act 1965 ('the CA 1965'), which is now s 471 of the CA 2016 does not rule out bona fide transactions. That much is clear from the Federal Court case of *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313 at p 323; [2013] 3 CLJ 969 at pp 981–982 as follows:

[12] ... *It is true that ordinarily since the respondent company had been wound up on 24 August 2000, a disposition of the company's property after the commencement of the winding up, which was on 31 May 2000 (filing of the petition) would be void. However based on the peculiar set of facts of the case, it is our considered view that the proviso in s 223 of the Act is still operative in relation to the transactions which took place and the court has the power and jurisdiction to declare the transactions as valid*.

[13] It is to be noted that s 223 of the Act makes no mention as to time. It is our view validation can be made by the court at any time. We are in agreement with the submission of learned counsel for the appellants that to insist that the purchasers must have applied for a validation after the company was wound up, there must be knowledge. Here the purchasers had no knowledge at all of the winding up order at the material time. *It is also noted that the Act does not prescribe as to how the discretion under s 223 of the Act is to be exercised. However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding up, and even after a winding order has been granted based on two broad considerations*:

(a) *if the transaction(s) are beneficial to the general body of creditors; or*

(b) *if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned*.

A [14] *The general rule in s 223 of the Act is that it does not shut out bona fide transactions*. In *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; [1988] 1 LNS 44, Seah, SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 which states:

B

> that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.

C The discretion is an unfettered one. (Emphasis added.)

[34] From the above, bona fide transactions are those transactions which the court finds to fall within either of the broad considerations laid down.

D **[35]** It is to be noted that in *Wong Wee Kheong*, there was an absence of knowledge of the winding up petition.

AS AGAINST THE FIRST RESPONDENT

E **[36]** As alluded earlier, the HC found that the first respondent had no knowledge of the winding up petition and that the first respondent only knew of the winding up order after he received the notice to attend the first meeting of the creditors and contributories on 19 December 2017. It was then said it is only to be expected that the dispositions were in the course of the company's ordinary trade and done in good faith ie bona fide and the dispositions had benefitted the company's general body of creditors.

F

Knowledge

G **[37]** On the issue of knowledge, the appellant had on 11 January 2023 obtained an order from this court to admit fresh evidence (encl 41/1–3) as per the letter of service dated 10 October 2017 of the winding up petition and the letter of service dated 13 December 2017 of the sealed winding up order. These letters of service can be found in encl 39/4–9. A perusal of the letters would show they had been served on the registered address at Jalan Kuchai Lama and the business address of the company. Refer to exh AJ6 to the affidavit in support of the fresh evidence application, to show the SSM search (encl 9/95).

H

I **[38]** We find that the service of the winding up petition was in accordance with r 25(1) of the Companies (Winding-Up) Rules 1972 ('the 1972 Rules') where such petition shall be served at the registered office of the company. The aforesaid rule provides as follows:

> 25 Service of petition

(1) Every petition shall, unless presented by the company, be served upon the company at the registered office of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at the registered office or principal place of business, ...

[39] Hence, it follows that the first respondent, being the director of the company would have knowledge of the winding petition. As was said in *Lembaga Kumpulan Wang Simpanan Pekerja v Adorna RMIT Sdn Bhd & Ors* [2003] 4 MLJ 729 at p 730:

... Directors are the alter ego of a company. It is therefore not appropriate for a director to escape culpability by pleading that he is a sleeping partner or director, or a silent director or a non-active director.

[40] In *Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors* [2008] 8 MLJ 450 it was said at p 457:

[10] Even, assuming that the plaintiff is a non-executive director, nevertheless *he is still a director in the eyes of the law and his roles and duties are governed by the CA* in particular, s 132. Furthermore a non-executive director is entrusted to look after the affairs of the company and to keep a close watch on the company's managers and other directors in order to safeguard the investment of shareholders ...

...

[12] *It is trite law that the affairs of the company, as a separate legal entity, are managed by the directors of the company* ... (Emphasis added.)

[41] In essence, the company acts through its director and the affairs of the company has to by necessity be managed by the directors. It does not lie on the first respondent to escape liability by saying, as he did, that he was the muscles behind the company, managing projects and work sites with the second respondent being the brains, managing the affairs of the company. When the winding up petition was served at the registered office of the company, that sets the winding up proceedings on course. The first respondent too cannot evade liability by saying that such service does not equate to personal knowledge as that is not what the law in the form of r 25(1) of the Rules 1972 says. The law only requires service on the registered address of the company.

[42] In this regard, s 213(1) of the CA 2016 spells out in no uncertain terms the duties and responsibilities of company directors. It provides as follows:

213 Duties and responsibilities of directors

(1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.

[43] We therefore find that the first respondent had knowledge of the winding up petition.

[44] The HCJ had in para 38 stated that as the first respondent had no knowledge of the winding up petition it is only to be expected that the dispositions were in the course of the company's ordinary trade and in good faith. This part of the finding cannot possibly stand where we have found that indeed the first respondent had such knowledge.

[45] We thus find the dispositions made after the presentation of the winding up petition are void. We now consider whether the transactions are bona fide as per the principles identified in *Wong Wee Kheong*.

Principles identified in Wong Wee Kheong

[46] To recap, the principles identified in *Wong Wee Kheong* at p 323 (MLJ); at p 982 (CLJ) were:

(a) if the transaction(s) are beneficial to the general body of creditors; or

(b) if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned.

Beneficial to the general body of creditors

[47] We deal with the dispositions to the third party creditors other than to the third respondent. Apart from the dispositions listed in para 1(g) of encl 1 to Soon Hin Hardware Sdn Bhd, para 1(j) to Messrs Ferida, Hassan, Low & Ng and para 1(m) to Public Bank Bhd, we find that the rest of the dispositions were in the form of repayment of loans to companies connected to the first respondent or to a sibling, and without documents evidencing such loans.

[48] The averments in the appellant's affidavit in reply show the following:

(a) Liew Yann Min, a director and shareholder of SJEE Engineering Sdn Bhd is the elder brother of the first respondent;

(b) the shareholders and directors of Perkasa Solaris Sdn Bhd are the first and second respondents;

(c) Liew Yee Min, the proprietor of Mega Tyres and Car Services, is the first respondent's sibling; and

(d) there are no documents to prove the loans given.

[49] Refer to paras 10.2, 10.5, 10.6, 10.7, 10.9, 10.10 and 10.12 of the appellant's affidavit in reply (encl 4/38–45).

[50] The first respondent claimed to be able to produce bank statements and cash book statements to support the loans given to it. We refer for instance, to encl 6/7–8, which is the document to support a loan given by Ng Sin Yee where the bank statement purports to show an entry of RM50,000 and the cash book statement records it accordingly.

[51] However, we agree with the appellant that these and the other documents are internal documents without any audited documents in support and are thus suspect. Further, as per para 5 of the appellant's affidavit in support (encl 4/7):

> 5. The liquidator had sent notices to the Directors and Secretary of the company requesting them to submit a Statement of Affairs and surrender all books and records but was not avail as of to date the Directors have failed, neglected, and refused to do the same.

[52] Under the circumstances, it cannot be said that the dispositions to individuals, to siblings and to the respondent's own company can be deemed to have benefitted the company's general body of creditors where the dispositions are not bona fide and the documents in support of the loans given are suspect.

[53] Surely it cannot be the case that paying a loan without proper documentation is treated to be in the course of the company's ordinary trade or for that matter paying to a company where the first respondent is a director and shareholder along with the second respondent.

[54] It was also held by the HCJ that the appellant had not identified any creditors of the company being prejudiced which meant there was no evidence of undue preference. We find this to be incorrect as the appellant had provided a list of creditors as in encl 5/147–148 to Appeal 1297. This was the proof of debt submitted by Insolvency Department to the liquidator which showed an amount of RM12,029,520.98. These would be the creditors prejudiced by the dispositions made and it cannot be said that such dispositions are to the benefit of the general body of creditors.

[55] The dispositions to Soon Hin Hardware Sdn Bhd, Messrs Ferida, Hassan, Low & Ng and Public Bank Bhd suffer the infirmity of being made after the presentation of the winding up petition and not being beneficial to the general body of creditors.

Just and fair with particular regard to the good and honest intention of the persons concerned

[56] In *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and*

another action [1996] 1 MLJ 872, the following was stated at p 882:

> Dispositions are said to be void under s 223 of the Companies Act 1965 '*unless the court otherwise orders*'. Thus, each case must be approached and dealt with on its own facts and circumstances. No two cases are the same. It revolves on the good faith and honesty of the personalities, and it is here that the judge's commonsense opinion of what is just and fair prevails: *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 at p 25; *Re J Leslie Engineers Co Ltd (In liquidation)* [1976] 1 WLR 292 at p 304 *laid down the now classic principle that in deciding the existence of good faith and honest intention, the absence of knowledge by the transferee of the winding up petition was a very powerful factor in favour of validation*. Incidentally, it is pertinent to note that in *Re Gray's Inn Construction Co Ltd*, it was held that the court should not validate a transaction if its effect was to pay off a creditor in full at the expense of the general creditors. (Emphasis added.)

[57] Here, the knowledge of the first respondent of the winding up petition is a factor to show the absence of a good and honest intention.

AS AGAINST THE SECOND RESPONDENT

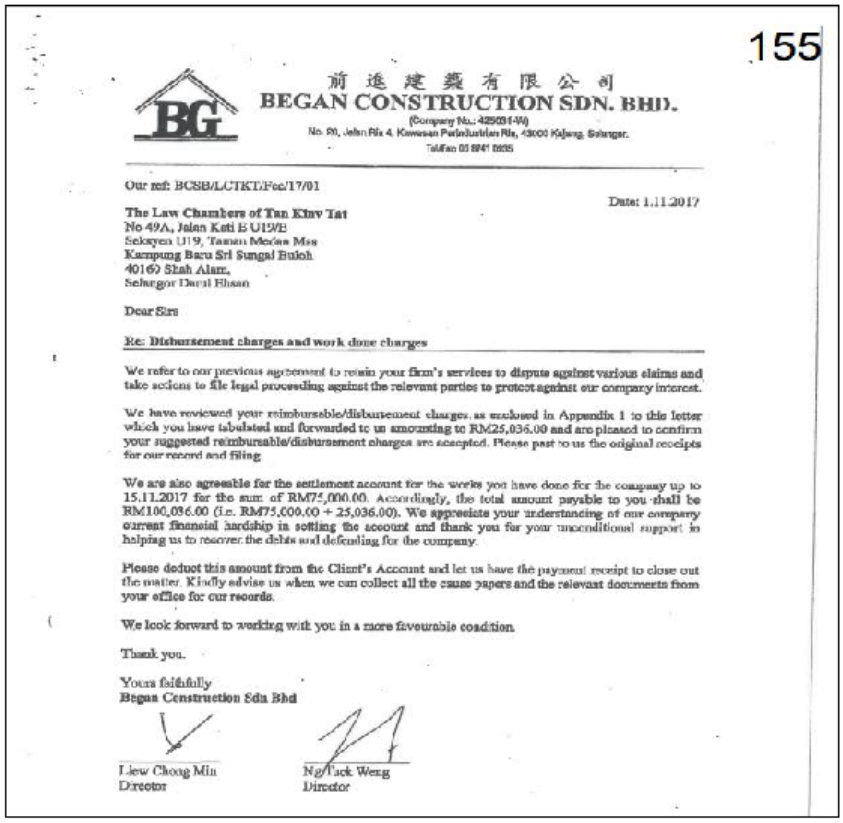
[58] We deal next with the second respondent who was absent in the HC proceedings and this appeal. The appellant has sought to make him jointly and severally liable with the other respondents. We agree with the HCJ that as the second respondent had not replied to the assertions made by the appellant, he would be deemed to have admitted to such assertions and that the application of the *Ng Hee Thoong* principle would be subject to the court's decision on the first respondent's liability. The effect is that if the first respondent is liable, the first respondent is equally liable.

AS AGAINST THE THIRD RESPONDENT

[59] The firm of TKT had represented the company in the adjudication proceedings and was instructed by the first and second respondents to receive the award sum on behalf of the company.

[60] Then came the letters of instruction ('instructions') from the company signed by the first and second respondents to make the payments to various third parties, including the third respondent. These were duly done. The instructions are dated between 27 October 2017 to 23 November 2017 and can be seen in encl 4/88–128 together with the payment made. The fact of their issuance is not disputed. The full particulars of the dispositions correspond with the particulars listed in paras 1(a) to (o) of encl 1.

[61] The instructions to pay the third respondent and the payment, in encl 4/98, 99, 126 and 127 are appended as follows:



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前進建築有限公司
BEGAN CONSTRUCTION SDN. BHD.
(Company No.: 425031-W)
No. 20, Jalan Rix 4, Kawasan Perindustrian Rix, 43000 Kajang, Selangor.
Telefax 03 8741 0835

Our ref: BCSB/LCTKT/Fee/17/01

Date: 1.11.2017

The Law Chambers of Tan Kinv Tat
No 49A, Jalan Keti B U15/E
Seksyen U15, Taman Medan Mas
Kampung Baru Sri Sungai Buloh
40160 Shah Alam,
Selangor Darul Ehsan

Dear Sirs

Re: Disbursement charges and work done charges

We refer to our previous agreement to retain your firm's services to dispute against various claims and take actions to file legal proceeding against the relevant parties to protect against our company interest.

We have reviewed your reimbursable/disbursement charges, as enclosed in Appendix 1 to this letter which you have tabulated and forwarded to us amounting to RM25,036.00 and are pleased to confirm your suggested reimbursable/disbursement charges are accepted. Please past to us the original receipts for our record and filing.

We are also agreeable for the settlement account for the works you have done for the company up to 15.11.2017 for the sum of RM75,000.00. Accordingly, the total amount payable to you shall be RM100,036.00 (i.e. RM75,000.00 + 25,036.00). We appreciate your understanding of our company current financial hardship in setting the account and thank you for your unconditional support in helping us to recover the debts and defending for the company.

Please deduct this amount from the Client's Account and let us have the payment receipt to close out the matter. Kindly advise us when we can collect all the cause papers and the relevant documents from your office for our records.

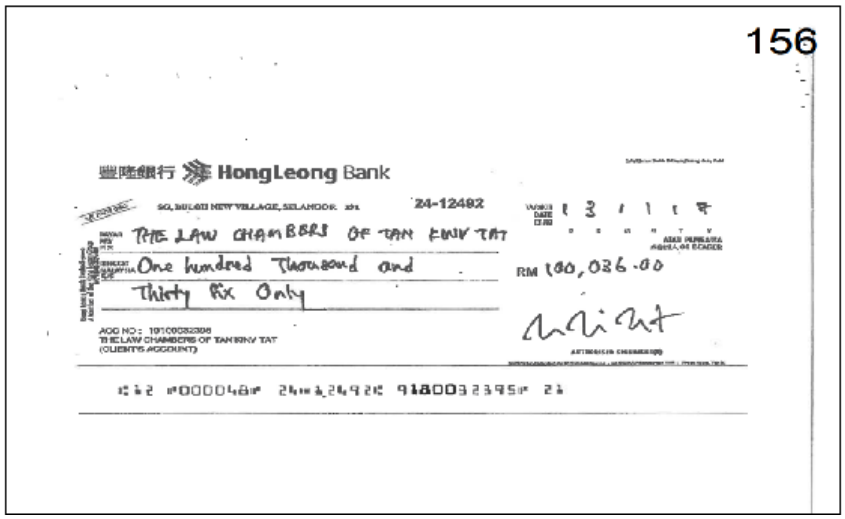
We look forward to working with you in a more favourable condition.

Thank you.

Yours faithfully
Began Construction Sdn Bhd

Liew Chong Min
Director

Ng Tack Weng
Director



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豐隆銀行 HongLeong Bank

24-12482

PAY THE LAW CHAMBERS OF TAN KINV TAT

One hundred Thousand and Thirty Six Only

RM 100,036.00

A/C NO.: 19100282306
TR KL LAW CHAMBERS OF TAN KINV TAT
(CLIENTS ACCOUNT)

⑆62 ⑈000048⑈ 24⑈24925 91800323950⑈ 25

A

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BEGAN CONSTRUCTION SDN. BHD.

Our ref: BCSB/LCTKT/TKTMisc/17/01

Date: 23.11.2017

The Law Chambers of Tan Kinv Tat
No 49A, Jalan Kad F U19/E
Seksyen U19, Taman Medan Mas
Kampung Baru Sri Sungai Buloh
40160 Shah Alam,
Selangor Darul Ehsan

By Email/By Post

Dear Sirs

Re: Client's Account Remaining Sum

Our meeting on the 23.11.2017 refers.

We appreciate your kind assistance to assist us to disburse puri payments to accounts owing, we would like to pay you as a small token of appreciation for the works you have rendered for us as we are out of staff to handle the account matter.

Please deduct a sum of RM5,000.00 for expenses and time you have spent in assisting us to handle the account matter to pay the judgement sum, mediated sums and loans to the relevant parties. Any remaining sum in the client's account is to be banked into Began Construction Sdn Bhd's bank account in Public Bank Bhd with account number 3184620111.

Yours faithfully
Began Construction Sdn Bhd

Liew Chong Min
Director

Ng Tuck Weng
Director

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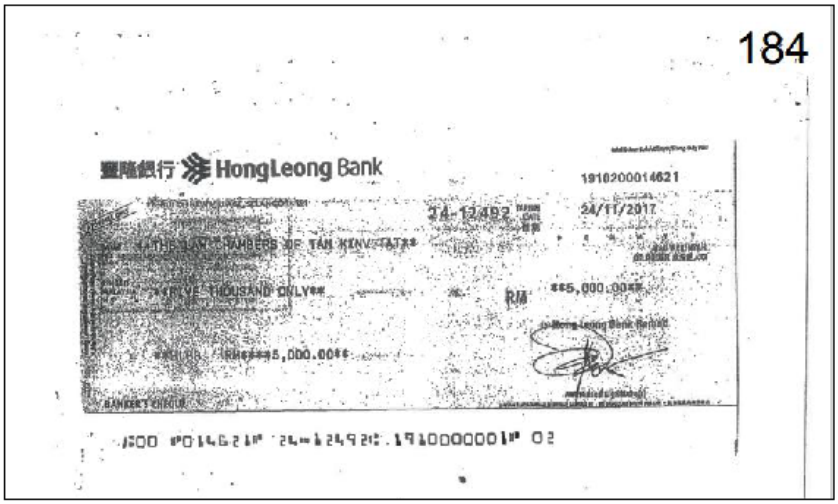

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HongLeong Bank

191020001 4621

24/11/2017

THE LAW CHAMBERS OF TAN KINV TAT

RM ***5,000.00**

BANKER'S CHEQUE

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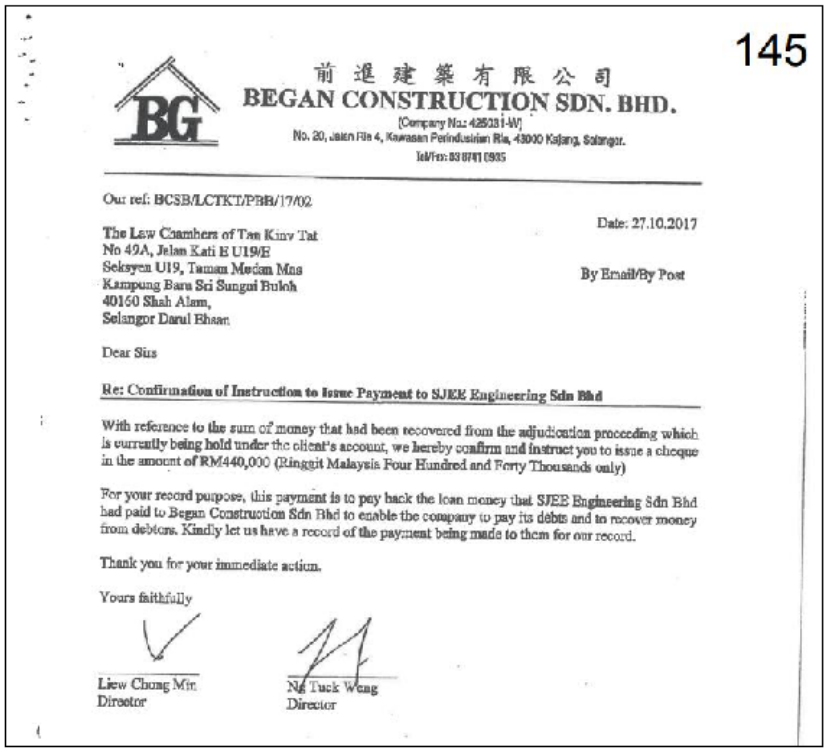
[62] As the other instructions are too numerous, we will append the first such Instruction given and the payment made, as in encl 4/88–89:



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前進建築有限公司
BEGAN CONSTRUCTION SDN. BHD.
(Company No.: 425231-W)
No. 20, Jalan Fis 4, Kawasan Perindustrian Ria, 43000 Kajang, Selangor.
Tel/Fax: 03 8741 0935

Our ref: BCSB/LCTKT/PBB/17/02

Date: 27.10.2017

The Law Chambers of Tan Kinv Tat
No 49A, Jelan Kati E U19/E
Seksyen U19, Taman Medan Mas
Kampung Baru Sri Sungai Buloh
40150 Shah Alam,
Selangor Darul Ehsan

By Email/By Post

Dear Sirs

Re: Confirmation of Instruction to Issue Payment to SJEE Engineering Sdn Bhd

With reference to the sum of money that had been recovered from the adjudication proceeding which is currently being held under the client's account, we hereby confirm and instruct you to issue a cheque in the amount of RM440,000 (Ringgit Malaysia Four Hundred and Forty Thousands only)

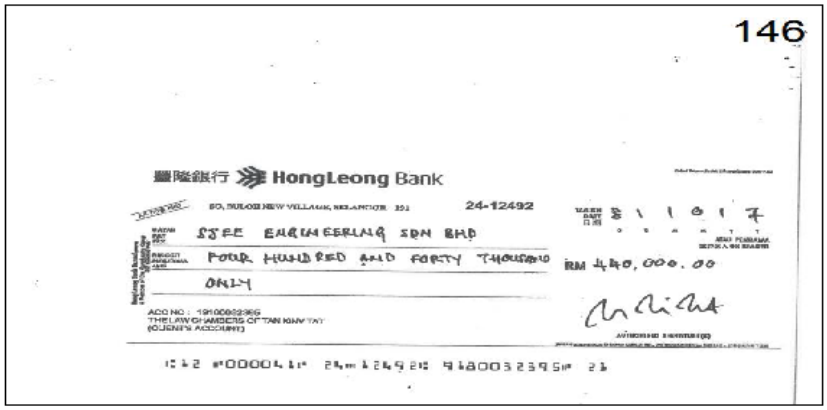
For your record purpose, this payment is to pay back the loan money that SJEE Engineering Sdn Bhd had paid to Began Construction Sdn Bhd to enable the company to pay its debts and to recover money from debtors. Kindly let us have a record of the payment being made to them for our record.

Thank you for your immediate action.

Yours faithfully

Liew Chung Min
Director

Ng Tuck Weng
Director



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HongLeong Bank

24-12492

SJEE ENGINEERING SDN BHD

FOUR HUNDRED AND FORTY THOUSAND

ONLY

RM 440,000.00

ACC NO.: 19100002365
THE LAW CHAMBERS OF TAN KINV TAT
(CLIENT'S ACCOUNT)

[63] The above will thus show the third respondent received instructions from the company signed by the first and second respondents to pay out, and these were duly acted upon.

[64] In so far as knowledge of the winding up petition is concerned, we are of the considered opinion that the third respondent did not have any such knowledge. We say so because the third respondent and/or TKT was only

involved in the adjudication proceedings and was never involved in the winding up petition and its related proceedings. There was no evidence that the existence of the winding up petition was made known to the third respondent. Eventually, by the time of winding up, TKT had already been discharged by the company.

[65] Liability on paying out the dispositions cannot possibly attach on the third respondent where he and/or TKT acted on the instructions and had no knowledge of the winding up petition.

[66] In addition, we find that the appellant has no cause of action against the third respondent under s 541 of the CA 2016 which deals with, inter alia, the action of an 'officer'. An officer is defined in s 2 as follows:

> ... 'officer', in relation to a corporation, includes —
>
> (a) any director, secretary or employee of the corporation;
>
> (b) a receiver and manager of any part of the undertaking of the corporation appointed under a power of contained in any instrument; and
>
> (c) any liquidator of a company appointed in a voluntary winding up,
>
> ...

[67] From the above, it is clear that the third respondent is not an officer within the interpretation in s 2 and that s 541 read with s 2 does not attach liability against the third respondent.

[68] The above was also the finding of the HCJ and the appellant counsel has stated it is not appealing against this part of the decision but that the payments were made to the third respondent.

[69] Nevertheless, it is only that the third respondent is not personally liable for the dispositions made to itself and the other third parties. The dispositions are still void for breach of s 471(1) of the CA 2016.

[70] We were referred to *Zulpadli & Edham* which dealt with payments made to the appellant firm of solicitors after the presentation of a winding up petition. This court found that a charging order under s 123 of the Legal Profession Act 1976 was out of the question (para 20). This court then said only a validation order was doable as follows at p 171:

> [21] On the facts of the present case, a validation order under s 223 was the only doable option. But there was no application from the appellant for such an order. Winding up had commenced against Inai on 29 June 2009, that is, at the time of the presentation of the petition of winding up (see s 219(2) of the Companies Act

1965). Without an order of validation, that remittance of RM1,400,000 to the appellant on 19 August 2009, which was clearly a disposition of the property of Inai after commencement of winding up, was void (see *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 ; *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309 ; *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814); and in *re Ashmark Ltd (in Liquidation and Receivership)* [1990] 2 IR 10, amongst a host of authorities on s 223 or equipollent provision). 'The disposition rendered void is void at the time it takes place' (see McPherson, *The Law of Company Liquidation*, (4th Ed) at p 222).

[22] Without a charging order or an order of validation, the entire remittance to the appellant was void. The entire remittance must be returned to Inai.

[71] We note that the appellant there pitched its case on the basis of a lien held over the payment. The facts are also different where here the third respondent paid out based on the clear terms of the instructions issued by the company and without knowledge of the winding up petition.

CONCLUSION

Appeal 1296

[72] For the above reasons, we allow Appeal 1296 against the first respondent as follows:

(a) order in terms of encl 1, para 1, that the disposition of RM1,496,730.38 is void, other than para 1(d) and (e) on the disposition of RM20,000 made to Optad and RM120,000 made to QST; and

(b) order in terms of encl 1, para 2, against the first and second respondent only for the amounts listed in para 1 (a), (b), (c) and (f) to (o).

[73] We dismiss the appeal against the third respondent.

[74] The decision of the HC is set aside to the extent as above.

[75] On costs, we award RM10,000 to the appellant to be borne by the first respondent and RM10,000,00 to the third respondent to be borne by the appellant. All costs are subject to allocatur.

Appeal 1297

[76] As parties have agreed that the outcome of Appeal 1296 binds Appeal 1297, we allow Appeal 1297 other than para 2(d) and (e) of encl 1, on

A the disposition of RM20,000 made to Optad and RM120,000 made to QST. The decision of the HC is set aside to the extent as above. We make no order as to costs.

Order accordingly.

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Reported by Ashok Kumar

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